

SERVICE DATE – DECEMBER 21, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087 (Sub-No. 8)

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION—CONTROL—EJ&E WEST COMPANY

Digest:¹ The Village of Barrington, Ill., has requested that the Board reopen this proceeding to require Canadian National Railway Company to fund a grade-separated crossing at U.S. Highway 14 in the Village of Barrington as a condition of the Board's 2008 approval of the carrier's acquisition of EJ&E West Company. The Board finds that the Village of Barrington has not presented new evidence or substantially changed circumstances that warrant the requested additional mitigation and therefore denies the request.

Decided: December 20, 2018

On August 8, 2018, the Village of Barrington, Ill. (Barrington), filed a petition to reopen this proceeding to require Canadian National Railway Company to provide funding for a grade-separated crossing in Barrington at U.S. Highway 14 (U.S. 14). This is Barrington's fourth petition to reopen requesting the same relief. Barrington's current petition is primarily based on a June 12, 2018 incident in which a stopped freight train blocked four at-grade crossings in Barrington, requiring ambulances to detour around the blockage. Barrington argues that the June 12 incident demonstrates that the current mitigation imposed to facilitate emergency service response is insufficient. For the reasons discussed below, Barrington's petition will be denied.

BACKGROUND

In December 2008, the Board approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively, CN) of EJ&E West Company, a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company, subject to environmental and other conditions. Canadian Nat'l Ry.—Control—EJ&E W. Co. (2008 Final Decision), FD 35087 et al. (STB served Dec. 24, 2008), aff'd sub nom. Vill. of Barrington v. STB (Barrington I), 636 F.3d 650 (D.C. Cir. 2011). The approval was subject to, among other conditions, an initial five-year monitoring and oversight period to allow the Board to monitor the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

impacts of the transaction.² As part of the Board’s oversight, CN submitted monthly reports on its operations and quarterly environmental reports so that the Board would be kept apprised of the implementation and effectiveness of the mitigation conditions.

Prior to the approval of the acquisition, in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, the Board’s Office of Environmental Analysis (OEA)³ prepared an Environmental Impact Statement (EIS) examining the potential environmental effects of the transaction, including an extensive analysis of the transaction’s potential impact on traffic congestion and safety at the 112 highway/rail at-grade crossings along the EJ&E rail line. Based on CN’s estimates for projected train traffic on the EJ&E line for the year 2015, OEA recommended highway/rail at-grade crossing mitigation for eight of 13 “substantially affected”⁴ crossings and found a grade separation to be appropriate mitigation for two of those crossings. The crossing at U.S. 14 did not meet the Board’s criteria for a “substantially affected” crossing, as any traffic issues would primarily be the result of preexisting conditions. See 2008 Final Decision, slip op. at 45 & n.101.

The Board also considered the effect of the proposed transaction on emergency service providers in the communities located along the EJ&E line. See id. at 48-49. In the Final EIS, OEA determined that 14 fire protection and hospital facilities might be substantially affected by the acquisition, and the Board ordered mitigation to communities containing seven⁵ of the affected fire protection and hospital facilities, including Barrington Fire Department’s Station No. 1 and Barrington’s Advocate Good Shepherd Hospital, to minimize impacts on emergency response providers that the Board determined may be substantially affected by the transaction. Id. at 48, 77; (see EIS 2-49 to 2-65, Dec. 5, 2008, FD 35087 (Final EIS)). The Board required CN to “install a real-time video monitoring (CCTV) system with video cameras at appropriate

² The oversight period was ultimately extended until January 23, 2017. Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 5 (STB served Dec. 17, 2014) (with Board Member Begeman dissenting).

³ OEA was known as the Section of Economic Analysis when the environmental review was prepared.

⁴ OEA designated rail crossings as “substantially affected” if a crossing met or exceeded at least one of three threshold criteria, based on rail and car traffic projections for 2015: (1) crossing level of service (LOS) (where a crossing was at or over capacity and would be reduced to a Crossing LOS of E or F as a result of the transaction); (2) effects on queue length (where a transaction-related queue length would block another roadway that would not otherwise be blocked); and (3) total amount of delay for all vehicles stopped at a crossing (where a crossing would experience more than 40 hours of total transaction-related vehicle delay in a 24-hour period). (EIS 4.3-8 to 4.3-10, July 25, 2008, FD 35087 (Draft EIS).)

⁵ Of the 14 emergency service facilities that OEA determined might be substantially affected by the acquisition, one of the facilities had a grade-separated crossing within three miles of its location, and six of the facilities were in communities that entered into negotiated agreements with CN. 2008 Final Decision, slip op. at 48. As a result, the Board did not impose mitigation to minimize potential impacts on those facilities. Id.

locations so that the movement of trains can be monitored and reasonably predicted.” 2008 Final Decision, slip op. at 48. The Board imposed this requirement on CN through Mitigation Condition No. 18 (MC 18), which identified U.S. 14 and the three other crossings in Barrington, all of which are at-grade, as locations that would receive video monitoring as part of the mitigation for emergency service providers. Id. at 77.

In April 2010, CN filed a petition to reopen the proceeding for the limited purpose of modifying MC 18 to allow CN to install its own web-based system, Active Crossing System (ACS), instead of CCTV. Barrington notified CN that it did not object to the replacement of CCTV with ACS. (CN Pet., Ex. A, Apr. 23, 2010, Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 et al.) The Board granted CN’s petition and modified MC 18 to require CN to implement ACS. See Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 et al., slip op. at 3-4 (STB served Aug. 30, 2010).

In one of its three previous requests to reopen this proceeding, Barrington raised, among other things, the effectiveness of ACS, the impacts of longer and slower trains on emergency services, and the impacts of trains that could block all four Barrington intersections. (See Barrington Pet. 24, Nov. 26, 2014; Barrington Surreply 21-23, Jan. 5, 2015.) The Board denied the request to reopen, finding that Barrington had presented neither new evidence nor changed circumstances that warranted reopening. See generally Canadian Nat’l Ry.—Control—EJ&E W. Co. (May 2015 Decision), FD 35087 (Sub-No. 8) (STB served May 15, 2015), recons. denied (STB served Nov. 4, 2015). With respect to Barrington’s concerns regarding the functionality of ACS, the Board suggested that Barrington should work with CN to resolve those issues, noting that CN had indicated a willingness to “determine if there are practical improvements that can be made to ACS.” May 2015 Decision, slip op. at 8 n.24.

The Board has also denied Barrington’s three previous petitions seeking reopening and funding for a grade separation; and for those decisions for which Barrington sought judicial review, the courts have affirmed the Board’s determinations.⁶ Most recently, in its October 2017 Decision, the Board denied Barrington’s petition to reconsider the Board’s April 2017 Decision, which denied reopening. Barrington appealed the Board’s October 2017 Decision to the U.S. Court of Appeals for the Seventh Circuit, which denied Barrington’s petition for review on June 11, 2018. Barrington III, 892 F.3d at 273.⁷

⁶ See Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8) (STB served Nov. 8, 2012), aff’d sub nom Vill. of Barrington v. STB (Barrington II), 758 F.3d 326 (D.C. Cir. 2014); May 2015 Decision; Canadian Nat’l Ry.—Control—EJ&E W. Co. (April 2017 Decision), FD 35087 (Sub-No. 8) (STB served Apr. 26, 2017), recons. denied (October 2017 Decision) (STB served Oct. 30, 2017), aff’d sub nom Village of Barrington, Ill. v. STB (Barrington III), 892 F.3d 252 (7th Cir. 2018).

⁷ A detailed background of Barrington’s previous actions before the Board can be found in Board’s April 2017 Decision, slip op. at 1-4, and in Barrington III, 892 F.3d at 257-66.

Despite these prior Board decisions and court rulings, in its current petition to reopen this proceeding, filed on August 8, 2018, Barrington asserts, based primarily on the June 12, 2018 blockage incident, that the Board's mitigation has failed to address the 2008 transaction's impacts on emergency service responders and once again asks that the Board require CN to provide funding for a grade separation at the U.S. 14 crossing.

PRELIMINARY MATTER

Barrington filed its petition to reopen on August 8, 2018, and CN filed a reply on August 29, 2018. At that time, briefing was complete, and this case was ripe for decision. Following CN's reply, however, the Board received additional filings from the parties. By motion filed September 14, 2018, Barrington requested leave to file a response to CN's reply. In a reply filed on October 4, 2018, CN requested leave to reply to Barrington's September 14 reply, should it be accepted by the Board. On October 15, 2018, Barrington filed a motion for leave to file a reply in response to CN's October 4 reply.

Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant Barrington's and CN's requests and accept their respective replies into the record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

DISCUSSION

Standard for Reopening. Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to lead the Board to materially alter its prior decision. If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not reopen. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); DesertXpress Enters.—Pet. for Declaratory Order, FD 34914, slip op. at 6-8 (STB served May 7, 2010).

Further, to be sufficient to warrant reconsideration, “new evidence” must be evidence that was not reasonably available to the party when the record was previously developed. See Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence); accord Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989); Can. Nat'l Ry.—Control—Ill. Cent. Corp., 6 S.T.B. 344, 350 (2002) (“‘[N]ew evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.”).

Barrington's Argument. Barrington alleges that new evidence and changed circumstances warrant reopening the Board's 2008 Final Decision to modify the mitigation at the U.S. 14 crossing—specifically, to require a grade separation—to address adverse impacts of the 2008 control transaction on emergency service providers. Barrington bases its request primarily

on a June 12, 2018 incident in which a train stopped due to a mechanical failure and blocked all four crossings in Barrington for 52 minutes. As a result of the blockage, two emergency response vehicles needed to make detours to reach Advocate Good Shepherd Hospital. (Barrington Pet. 9, Aug. 8, 2018.) Barrington argues that the June 12 incident “demonstrates clearly the remedial failure of mitigation intended to eliminate emergency response delays in the community.” (*Id.* at 1.) Barrington also criticizes CN’s implementation of ACS, detailing delays and various other alleged failures. (*Id.* at 8-9.) However, Barrington ultimately argues that, even if ACS worked as intended, neither it nor any “technology solution” would provide the appropriate mitigation to help first responders avoid delay in Barrington. (*Id.* at 16.) Barrington also identifies longer trains and increased delays at crossings as contributing to the problem, citing train length data and calculations of emergency medical response delays due to stopped trains at three of the intersections in Barrington in 2016 and 2017, including the U.S. 14 crossing. (*Id.* at 23-29.) Instead of ACS, Barrington asks that the Board “require mitigation relief of a majority railroad-funded grade separation at U.S. Highway 14.”⁸ (*Id.* at 29.)

As discussed below, Barrington has not presented any new evidence, nor changed circumstances, that would “mandate a different result” from the one the Board reached in the 2008 Final Decision. Montezuma Grain, 339 F.3d at 542.⁹

Barrington’s Evidence and Arguments for Reopening and Imposition of a Grade Separation Are Not New and Do Not Demonstrate Substantially Changed Circumstances. Barrington relies primarily on the June 12, 2018 blockage incident, claiming that only a grade separation would provide the necessary relief to ensure that emergency responders have unimpeded access to Advocate Good Shepherd Hospital in Barrington. While the June 12 train stoppage occurred after Barrington’s previous challenges,¹⁰ it is the same type of occurrence that the Board already explicitly considered and, therefore, does not constitute new evidence or changed circumstances. Indeed, to a considerable extent, Barrington’s current petition merely reiterates its previous arguments for a grade separation, which the Board already addressed in its previous decisions.

Barrington’s petition focuses heavily on a train that blocked all four crossings in Barrington last June. (See Barrington Pet. 1-2, 9-17, 21-22, 29, Aug. 8, 2018.) However, that incident is an example of what Barrington argued might occur—and what the Board considered—in the original decision approving the transaction in 2008 and then on reconsideration in 2015. The Board initially considered the effect of CN’s acquisition on

⁸ Barrington did not state a dollar amount in its current request, but Barrington has previously requested that CN provide between \$37.5 million and approximately \$60 million of funding. (See Barrington & Ill. Dep’t of Transp. Pet. 6, Jan. 10, 2017 (requesting \$37.5 million, or 58% of the total cost); Barrington Pet. 9, Nov. 26, 2014 (requesting “\$47 million, an amount which is equal to 79% of the total project cost”); Barrington Mot. 15, Nov. 14, 2011 (“[T]he Board should . . . require CN to pay the full cost of a grade separation at U.S. Route 14.”).)

⁹ Barrington does not allege material error in the Board’s 2008 Final Decision.

¹⁰ See generally Barrington II.

emergency service providers 10 years ago in its EIS and 2008 Final Decision and imposed reasonable mitigation to alleviate that effect. 2008 Final Decision, slip op. at 48-49; (Final EIS 2-49 to 2-65). The Board noted that commenters had “raised concerns about how grade-crossing cameras can help emergency responders and the people they are attempting to help if the cameras were to show, for instance, that all area crossings are blocked.” 2008 Final Decision, slip op. at 49. The Board also noted that the Final EIS explained that EJ&E was an active rail line, and that the emergency service providers’ dispatching process “included the possibility that a crossing could be blocked.” Id. The Board then explained that the purpose of the CCTV mitigation was to “provide the emergency dispatchers with better and more timely information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities when appropriate.”¹¹ Id.

In Barrington’s November 2014 petition to reopen the Board’s 2008 Final Decision, Barrington argued that trains capable of blocking all four of the Barrington crossings simultaneously make it “imperative from a public life safety standpoint that grade separation mitigation be granted for the U.S. Highway 14 crossing,” and stated that a stopped train “block[ing] all four of the crossings in Barrington for an extended period of time” had already occurred after CN’s acquisition of EJ&E. (Barrington Pet. 24, 26.) CN responded that “[t]he Board already considered and addressed those arguments, imposing mitigation conditions for the benefit of first responders,” referring to the revised MC 18 that required CN to implement ACS. (CN Reply 21, Dec. 16, 2014.) In its January 2015 surreply, Barrington detailed its issues with ACS and argued that ACS did not adequately mitigate the effect of the 2008 transaction on emergency responders. (See Barrington Surreply 21-23, Jan. 5, 2015; see also id. at 23 (quoting Barrington Surreply, V.S. Jim Arie 2).)

Barrington’s arguments in its most recent petition echo those that it made in its November 2014 petition and January 2015 surreply challenging the Board’s 2008 determinations. As in 2014, Barrington argues that public safety requires a grade separation at U.S. 14.¹² And though Barrington again argues that flaws in ACS make it unusable, (Barrington Pet. 8-9, Aug. 8, 2018), it also argues that even if ACS worked perfectly, neither ACS nor any technology solution would be sufficient mitigation because those solutions

¹¹ The U.S. Court of Appeals for the District of Columbia Circuit affirmed the Board’s 2008 Final Decision in Barrington I, stating that “[t]he environmental impact statement identified which emergency responders would be ‘substantially affected’ and proposed specific measures to mitigate the impact on them[,]” and that “NEPA requires nothing more.” 636 F.3d at 672.

¹² (Compare Barrington Pet. 24, Nov. 26, 2014 (“[I]t is imperative from a public life safety standpoint that grade separation mitigation be granted for the U.S. Highway 14 crossing.”) with Barrington Pet. 29, Aug. 8, 2018 (“For the sake of public safety, the Board should order the only reasonable and feasible solution to address this critical emergency response situation in Barrington. The STB is respectfully requested to require mitigation relief of a majority railroad-funded grade separation at U.S. Highway 14 and the CN rail line.”) and Barrington Letter 2, Sept. 18, 2018 (“Barrington needs one failsafe unimpeded route to that hospital—and such a route requires a grade separation at U.S. Highway 14.”).)

do not prevent delays to Barrington's emergency responders, (*id.* at 16, 28; Barrington Reply 5, 10, Sept. 14, 2018; Barrington Letter 1, Sept. 18, 2018).

These arguments are the same as those Barrington presented and the Board considered in 2008, 2014, and 2015. In its May 2015 Decision, the Board confirmed that ACS was the appropriate mitigation. The Board noted Barrington's argument that the ACS technology is ineffective and inaccurate, but the Board highlighted that "Barrington consented to the use of ACS technology." May 2015 Decision, slip op. at 8 n.24 (citations omitted). The Board also suggested that Barrington should work with CN to resolve the functionality issues that Barrington had alleged about ACS: "To the extent that Barrington has suggestions for a more effective technology, we encourage Barrington to discuss this issue with CN, which has indicated a willingness to 'determine if there are practical improvements that can be made to ACS.'" *Id.* (quoting CN Reply to Surreply 20 n.34, Jan. 26, 2015). Barrington chose not to appeal the Board's May 2015 Decision (nor, apparently, did it choose to work with CN).

Barrington's arguments and evidence concerning train lengths are likewise the same as those presented in its previous filings. Barrington argues that increased train lengths contribute to the problem of emergency response delays because longer trains can block all four Barrington crossings at the same time. Barrington claims that the four crossings in Barrington span 5,918 feet, and before the 2008 transaction, the average train was only 2,760 feet in length. (Barrington Pet. 25-26, Aug. 8, 2018.) Barrington also states that, based on its observations, during selected months over the past several years, train lengths have increased, peaking in April 2016 at an average train length of 8,000 feet, with 19% of trains over 10,000 feet long. (*Id.* at 27.)

Barrington's evidence regarding train length does not constitute new evidence or changed circumstances. First, Barrington's observational data of CN train lengths, *see id.*, is the exact same data in the same chart that Barrington presented to the Board in its January 2017 reopening petition. (Compare Barrington & Ill. Dep't of Transp. Pet. to Reopen 15 with Barrington Pet. 27, Aug. 8, 2018.) Moreover, in preparing the Draft EIS, OEA calculated that the average train length would be 6,829 feet by 2015, almost 1,000 feet *longer* than the distance between the four crossings in Barrington. (See Draft EIS 4.3-16.) Therefore, the potential for a train to block all four crossings was reflected in the record before the Board in 2008.

Of the evidence provided by Barrington in its current petition, only the 2017 emergency medical response delay calculations could possibly be considered new because the calculations were not available until after Barrington's January 2017 petition to reopen and could arguably be considered different than evidence that the Board has considered previously. (See Barrington Pet. 24, Aug. 8, 2018 (providing data regarding 2016 and 2017 emergency medical response delays).) While this data could be classified as new, the Board has considered emergency response delay repeatedly. The evidence regarding such delays in 2016 is clearly not new—it was available when Barrington filed its January 2017 petition. See Toledo, Peoria & W. Ry., 462 F.3d at 753 (finding that evidence reasonably available before the Board issued its decision is not new evidence). As discussed below, however, even if the Board were to find that the

2017 medical response delay evidence is new, the Board finds that this evidence does not warrant a different outcome. See infra p. 10.

Even If Barrington’s Evidence and Arguments Could Be Considered New Evidence or Changed Circumstances, None Mandate a Different Result. The Board previously considered impacts of blocked crossings on emergency response vehicles and imposed reasonable and appropriate mitigation. The June 12 incident, accordingly, would not have changed the Board’s 2008 Final Decision—it is exactly the type of incident the Board considered in 2008 and why the Board imposed the CCTV, and later ACS, mitigation. This mitigation was designed to help address this situation, although Barrington has indicated that it has not used it since 2015.¹³ In fact, the June 12 incident highlights why the Board imposed emergency response mitigation in Barrington and why it once again encourages Barrington to work with CN to successfully adopt and use the ACS improvements.

Based on the June 12, 2018 incident, Barrington argues that ACS is insufficient mitigation because it still does not allow the most direct routing to the hospital and that “any alternative routing or hospital destination . . . is an inferior alternative because it automatically adds an unacceptable level of extra time.” (Barrington Mot. 3, Sept. 14, 2018 (emphasis omitted).) For this reason, Barrington asserts that a grade separation is “the only reasonable and feasible solution” that can address its emergency response situation. (Barrington Pet. 29, Aug. 8, 2018.) However, the Board’s 2008 Final Decision already rejected this fundamental premise of Barrington’s argument. The Board acknowledged in 2008 that crossings in Barrington may, on occasion, be blocked (as they had been before the approval of the acquisition) and, in response, imposed mitigation in the form of CCTV to provide information to Barrington’s emergency dispatchers. 2008 Final Decision, slip op. at 48-49. The Board’s imposed mitigation, CCTV and later ACS, is specifically designed to minimize the impact of such a situation, should it occur, even though it may not eliminate it.

Indeed, MC 18 was never intended to provide Barrington with “one failsafe unimpeded route”¹⁴ to Advocate Good Shepherd Hospital, especially when a failsafe, unimpeded route did not exist in Barrington even before the 2008 acquisition of control by CN. Nor was MC 18 “intended to eliminate emergency response delays in the community.” (Barrington Pet. 1, Aug. 8, 2018.) Instead, the Board ordered CN to install CCTV cameras, and later ACS, to provide Barrington’s and other communities’ dispatchers with “better and more timely

¹³ (See Barrington Surreply, V.S. Jim Arie 3, Jan. 5, 2015 (“Because the ACS system provides insufficient and useless data (and is error prone), I made the decision not to use it at all because it is counter-productive to operational efficiency and patient safety.”); Id., V.S. Dave Dorn 5 (“Because the [Barrington Police] Department can’t rely on the system or the data being accurate, we cannot ask our officers to use it in their decision-making when determining the most efficient call routing.”).)

¹⁴ (Barrington Letter 2, Sept. 18, 2018.)

information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities when appropriate.” 2008 Final Decision, slip op. at 49.¹⁵

Barrington also argues that ACS does not adequately mitigate the acquisition’s effect on emergency response providers. First, Barrington argues that errors and difficulties with the user interface render ACS unusable. Second, Barrington argues that, even if ACS worked perfectly, it would still be insufficient because “there is no technology solution that can really help first responders avoid delay in Barrington.” (Barrington Pet. 16, Aug. 8, 2018 (emphasis omitted).)

Both arguments are fatally flawed, however, because Barrington has not used ACS in almost four years and cannot, on the present record, demonstrate that ACS is insufficient mitigation. In the May 2015 Decision, the Board acknowledged Barrington’s difficulties with ACS, and encouraged Barrington to work with CN to improve the technology, as CN had indicated a willingness to “determine if there are practical improvements that can be made to ACS.” May 2015 Decision, slip op. at 8 n.24. Despite the Board’s suggestion, there is no evidence that Barrington has ever attempted to work with CN to utilize and improve ACS. It appears, rather, that Barrington has refused to use the technology or to work with CN in achieving improvements. In November 2016, CN offered a new version of ACS to Barrington, but Barrington did not accept the offer.¹⁶ (See Barrington Mot., Ex. 7, at 1, Sept. 14, 2018.) Rather than determine if CN’s improved ACS provided a better solution, Barrington chose not to access the system altogether.¹⁷

As it did in 2015, the Board again acknowledges Barrington’s claims regarding the difficulties with ACS. Although CN updated ACS in 2016, Barrington never attempted to use the new version. Therefore, Barrington cannot demonstrate that ACS is insufficient if it has not attempted to use the updated ACS system. The Board continues to encourage Barrington to address its concerns with ACS by working with CN, which states that it remains willing to work with Barrington and its emergency responders on improving ACS or developing other communication measures. (CN Reply 3, Aug. 29, 2018.) If Barrington agrees to implement the

¹⁵ In the future, if Barrington decides to work with CN and use ACS again, it should measure ACS’s performance against the Board’s intent in imposing MC 18, not against whether ACS entirely eliminates emergency response delays due to rail traffic.

¹⁶ When CN updated ACS to the new system in 2016, CN notified Barrington of the change and informed Barrington that the updated version required new login credentials. (CN Reply, V.S. Jim Kvedaras 3-4, Aug. 29, 2018.) Barrington acknowledged receipt of the notice but never requested the new credentials. (Id. at 4.)

¹⁷ Even following the June 12, 2018 incident, Barrington’s Village President stated that “[t]he Village has absolutely no interest in [ACS].” (Barrington Mot., V.S. Karen Darch 7, Sept. 14, 2018.) When CN noted that Barrington’s Assistant Chief of Police expressed interest in ACS after the incident, (see CN Reply 7, Oct. 4, 2018), Barrington filed a verified statement to reiterate that, in fact, Barrington did not have any interest in ACS, (see Barrington Mot., V.S. John Burke, Oct. 15, 2018).

updated ACS and it can later demonstrate that ACS is not working as intended, the Board could consider whether further action is required.

Barrington's arguments and evidence concerning train lengths likewise do not require a different result. As noted above, in imposing mitigation to address the potential effects on emergency services in affected communities, OEA and the Board considered average CN train lengths that could block all four crossings in Barrington simultaneously. (See Draft EIS 4.3-16.) Similarly, Barrington's emergency medical response delay calculations in 2016 and 2017 that it asserts are the result of longer trains also do not require a different result. The Board in 2008 predicted increases in the number and length of trains and the resulting blockages as part of its assessment of the effect of the transaction on emergency services when it decided to impose related mitigation measures. (See *id.*; see also Draft EIS 4.3-1 to 4.3-53, 4.3-59 to 4.3-60, 4.3-75, App. E; Final EIS 2-52, 2-54, 2-57.) Barrington's estimates showing that delays have in fact occurred in 2016 and 2017 are not unexpected and do not change the Board's analysis because Barrington has chosen not to use the mitigation the Board imposed since early 2015.¹⁸

CONCLUSION

Barrington's petition to reopen will be denied. The Board's mitigation condition of CCTV, and later ACS, was reasonable in 2008 and remains reasonable today. Barrington has not presented any new evidence or changed circumstances that would require reopening this proceeding to impose a grade separation. Barrington's current arguments also fail because Barrington has not even attempted to use the Board-imposed mitigation since well before the Board's last decision addressing this same issue.¹⁹

¹⁸ The Board further notes that, in 2008, OEA determined in the EIS that 2015 represented the limit of what was reasonably foreseeable with regard to projected rail traffic on the EJ&E line as a result of the acquisition, recognizing that forecasting traffic projections for time horizons beyond 2015 would be speculative. (Draft EIS 2-27.)

¹⁹ If the parties would like assistance in their discussions about using and improving ACS, the Board's Rail Customer and Public Assistance Program (202-245-0238; rcpa@stb.gov) is available to stakeholders to facilitate informal, private-sector resolution, without litigation, wherever possible.

It is ordered:

1. The Village of Barrington's August 8, 2018 petition to reopen is denied.
2. Barrington's motions for leave to file replies to CN's August 29, 2018 and October 4, 2018 replies are granted.
3. CN's motion for leave to file a reply to Barrington's September 14, 2018 reply is granted.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.